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February 27, 1986

Gordon D. McIntosh
Senator for Western Australia
Parliament of Australia - The Senate
Commonwealth Parliament Offices
City Centre Tower
44 St. George's Terrace
Perth, W.A. 6001

Dear Senator McIntosh:

In your letter of January 22, 1986 you asked for my comments on sections 5 and 6 of a paper prepared by the Australian Parliamentary Library Legislative Branch entitled, Australia-Indonesia Maritime Boundary: The "Timor Gap." This is my response. For convenience, I have attached hereto the relevant sections of the Research Paper and the questions to which they purport to be responsive.

I believe that the sections in question represent an inadequate and misleading response to the questions. They fail to come to grips with the relevant principles of international law and contain several misstatements of fact.

Section 5 asserts that the "United Nations General Assembly resolutions regarding the status of East Timor are of peripheral interest only to the Australian/Indonesian negotiations." At the outset, this cavalier comment completely ignores the fact that there are two resolutions of the Security Council, as well as a series of resolutions of the General Assembly on point. The gist of all of those resolutions is that the two main organs of the United Nations are on the record to the effect that Indonesia engaged in acts of aggression, the unlawful use of force against East Timor, and assorted other breaches of the United Nations Charter.

Aside from the factual problem in ignoring the Security Council, the Research Paper also misstates the legal implications of the U.N. resolutions. On one view of international law before 1945, acts of aggression could be ignored and law violators could be regarded as obtaining good title to territory which they grabbed. Yet that proposition was expressly denied as early as 1933 by the United States and a number of Latin American states in the Montevideo Convention on Right and Duties of States, 165 L.N.T.S. 19. Article 11 of that treaty provided that, "The contracting states definitely establish as the rule of their conduct the precise obligation

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not to recognize territorial acquisitions or special advantages which have been obtained by force whether this consists in the employment of arms, in threatening diplomatic representations, or in any other effective coercive measure. The territory of a state is inviolable and may not be the object of military occupation nor of other measures of force imposed by another state directly or indirectly or for any motive whatever even temporarily." This might, perhaps, have been regarded as merely a regional rule for the Americas, were it not for article 2, paragraph 4 of the United Nations Charter. That article provides that, "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." I have always believed that article 2, paragraph 4 embodied, among other things, albeit at a higher level of generality, the principle of article 11 of the Montevideo Convention and recognized it as a principle of universal application. That also appears to have been the view of the representatives of Australia who in 1970 agreed to (and were in fact among the sponsors of) the Declaration on Principles on International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc A/8028 (1970). That Resolution, unanimously adopted on the 25th anniversary of the coming into force of the U.N. Charter, contains among its provisions the following which echoes the Montevideo Convention: "The territory of a state shall not be the object of acquisition by another state resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal."

Again, in 1974, representatives of Australia, like representatives of other nations in the General Assembly, agreed to the unanimously adopted Definition of Aggression, G. A. Res. 3314, 29 U.N. GAOR, Supp. (No. 31) 142 (1974). Article 5, paragraph 3, also echoing the Montevideo language, provides that, "No territorial acquisition or special advantage resulting from aggression shall be recognized as lawful." Whatever general view one may take as to the law-making capacity of General Assembly resolutions, the two resolutions that I have mentioned are widely accepted as an attempt to spell out with more specificity the general principles enshrined in the Charter on this topic of territorial acquisition by force. It is very difficult to escape the conclusion that the proposition which they support is either one of international treaty law (regarding the 1970 and

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1974 resolutions as an authoritative interpretation of the Charter) or as one of customary international law (regarding the resolutions as an authoritative, unanimously accepted statement of the law on this point).

I believe, therefore, that Australia is under an international legal obligation not to recognize Indonesia's acquisition of East Timor. The Law of the Sea negotiations breach that duty.

To say, then, as does the Research Service's Paper, that "The key fact is that Australia recognizes Indonesia as the State in possession of East Timor and has chosen to negotiate with it on that basis" is to thumb a nose both at the United Nations' resolutions specifically relating to East Timor, and at those dealing with the use of force in general. One might also mention in this context the obligation of states under Article 25 of the Charter to carry out the decisions of the Security Council, to say nothing of the broader obligation in article 2, paragraph 5 of the U.N. Charter -- which encompasses decisions of the General Assembly as well -- to give the United Nations every assistance in any action it takes in accordance with the present Charter . . . ." Australia, in dealing with Indonesia in respect of East Timor is hardly assisting the United Nations in its efforts to obtain self-determination for the Timorese. Indeed, in light of such obligations as these, it would be surprising indeed if the U.N. regards itself as "merely provid[ing] a forum for the voicing of opinions of individual states," as the Research Service paper suggests.

It may well be that Australia plans to deal with Indonesia, come what may. But at least, there should be a frank acknowledgment that what is going on is in breach of the Charter and of customary international law.

While I regard the U.N. Charter as the central focus in this matter, the 1982 Law of the Sea Convention also supports the argument which I have just made. Article 301 of that treaty provides that, "In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations." To the extent that Indonesia makes claims concerning the resources of the sea and continental shelf areas surrounding East Timor, it can hardly claim to have refrained from the threat or use of

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force. In denying Timorese self-determination, it has acted in breach of other principles of law embodied in the Charter of the United Nations. Australia, in condoning those acts, is a party to Indonesia's breaches of the letter and spirit of article 301.

One further point should be mentioned, for the sake of completeness, on section 5 of the Research Paper. The preceding argument emphasizes the "use of force" aspects of the East Timor affair. If one were to concentrate, instead, on the denial of self-determination, it would be necessary to consider the impact of the International Court's advisory opinion in Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), [1971] I.C.J. Reports 4. There the Court spelled out the obligation of states not to deal with South Africa in respect of Namibia, in light of South Africa's illegal occupation of that territory. Much of what the Court said there applies by analogy to the present situation and drives one to essentially the same conclusion as does the use of force argument.

Section 6 of the Research Paper on Portugal's role, states quite accurately that Portugal does not recognize Indonesia's right to engage in negotiations with Australia over the Timor Gap. It has, in fact, protested forcefully. The Research Paper continues that, "Internationally, Portugal is seen to be vainly asserting vestigal [sic.] colonial rights no longer relevant on the world scene." It then asserts in a footnote that, "The situation resembles the Indian invasion of the Portugese colony of Goa in 1961. India was criticized for the use of force in the course of the takeover, but few nations were prepared to defend Portugal's continued sovereignty in the territory." This is quite misleading. To the extent that Portugal continues to be regarded by the United Nations as the "administering authority" of East Timor, it is in a context where Portugal is pledged to complete the self-determination process aborted by Indonesia. A better analogy than the Goa one is the role of the U.K. in respect of Zimbabwe where Britain was able finally to play a "vestigial" role in the ultimate decolonization of that country -- some years after the abortion of that process by the Smith regime. The Goa analogy is flawed. Whatever the rights and wrongs of that situation, the fact is that when it was debated in the Security Council, neither side was able to command sufficient votes to have a resolution adopted, and no compromise was possible. Indonesia was, on the other hand,

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soundly condemned for its invasion of East Timor, both in the Security Council (twice) and in the General Assembly (numerous times). Portugal's objection to the Australian actions appears to be on principled grounds.

The Research Request also asked what Portugal's options are. I suspect that, for political reasons, Portugal may not want to press further than its protest of September 1985. Should it wish to, it might certainly consider lodging a complaint with the General Assembly and the Security Council pursuant to the Peaceful Settlement of Disputes Provisions in Chapter VI of the U.N. Charter. As a practical matter, the Security Council or the General Assembly could do no more than protest the illegalities involved. As you know, Indonesia has in the past decade mounted a diplomatic campaign to have States ignore the legalities of the situation and to simply let the East Timor matter slide off the international agenda. It may well be that Indonesia commands enough votes at the U.N. (including Australia's!) to prevent the adoption of any resolution proposed by Portugal.

So far as Portugal and Australia are concerned, both have accepted the jurisdiction of the International Court of Justice in a way that seems to permit Portugal to take a case to the Court against Australia on the present issue. Indonesia has not accepted the jurisdiction of the Court. Were Portugal to bring suit against Australia, the Court might well decline to hear it in the absence of Indonesia which it might regard as an indispensible party.

That said, one must emphasize that the long term key to a solution of the East Timor issue lies not with Portugal but with the people of East Timor. Portugal, for all its past failings as a colonial power, does not dispute this. It is, after all, the self-determination of the Timorese which has been denied.

I do hope that these remarks are helpful. I should be happy to expand upon them if you wish.

Yours sincerely,

Roger S. Clark
Professor of Law

RSC:jm

Attachment